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February 3, 1997

BY HAND-DELIVERY

William F. Caton, Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Communications in IB Docket No. 95-59
and CS Docket No. 96-83

Dear Mr. Secretary:

On January 31, 1997, Lawrence R. Sidman, representing Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc.; Thomas Patton, Philips Electronics North America Corporation; Bruce Allan, Thomson Consumer Electronics, Inc.; and Gigi Sohn, representing the Consumer Federation of America and Media Access Project, met with William Kennard, General Counsel, and Stephen Bailey, Office of the General Counsel, to discuss the application of Section 207 of the Telecommunications Act of 1996 to rental units and condominiums. The meeting focused on the comments and reply comments filed by the parties on this issue.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and two written ex parte presentations submitted on behalf of Philips Electronics, N.A. Corporation and Thomson Consumer Electronics, Inc. to Messrs. Kennard and Bailey are being filed with your office.

Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures
cc: William Kennard
Stephen Bailey

THE PLAIN MEANING OF SECTION 207 OF THE TELECOMMUNICATIONS ACT OF 1996, AS WELL AS THE FUNDAMENTAL GOALS OF INCREASED COMPETITION AND UNIVERSAL SERVICE, REQUIRE THAT ITS PROTECTIONS APPLY TO ALL AMERICANS, INCLUDING THOSE WHO RENT THEIR HOMES OR LIVE IN CONDOMINIUMS

Section 207 of the Telecommunications Act of 1996 directs the Federal Communications Commission ("FCC") to:

> promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite [DBS] services.

Section 207 was designed to eliminate artificial governmental and private barriers, including zoning restrictions, homeowners' association rules and lease restrictions, that have denied viewers access to various sources of video programming and that have thwarted the development of a competitive multichannel video programming distribution ("MVPD") market.

The Clear and Unambiguous Language of Section 207 Requires the FCC to Include All American Viewers Regardless of Where They Live

To date, the FCC has not implemented Section 207 in compliance with either the plain meaning of the statute or Congressional intent. In August 1996, the FCC issued rules that provide qualified preemption of local zoning ordinances and homeowners' association rules. However, the FCC declined to apply the protection of Section 207 to viewers who rent a home or apartment or to viewers who own and live in a condominium, instead postponing its decision on these issues and requesting further comment from interested parties. As currently drafted, the FCC's rules limit the reach of Section 207 to public and private restrictions "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property..." 47 C.F.R. §1.4000(a) (Emphasis added.)

There is absolutely no basis in the statute or legislative history for engrafting a property ownership eligibility criterion onto the protections conferred by Section 207. Congress chose to protect the entire class of "viewers," not a subset of that class consisting solely of viewers owning single family homes.

According to the U.S. Census Bureau, approximately 35 million American families live in rented housing. An additional 1.4 million Americans own and live in condominiums or cooperatives. Combined, these groups represent more than thirty-eight percent of all American households. There is not a scintilla of evidence that Congress intended to exclude these millions of viewers from the coverage of Section 207.

The Commission simply is not at liberty to rewrite Section 207 to limit its reach. It must conform its rule to the plain meaning of the law and amend the rule so it applies to renters and condominium owners.

Extension of Section 207 Protection to Renters is Indispensable to Increasing Competition in the Multichannel Video Programming Distribution Marketplace

The FCC's recently released Third Annual Report on Competition in the Market for the Delivery of Video Programming concludes that cable remains dominant, accounting for eighty-nine percent of all MVPD subscribers. This conclusion prompted Meredith Jones, Cable Bureau Chief, to observe: "Cable still clearly dominates the market, and while competitors are making inroads, they aren't coming close to catching up...This means we have to work much harder to bring new entrants into the market to provide new competition to cable, to keep programming access open and nurture new technologies to compete with cable."

An integral part of the FCC's approach to increasing competition in the MVPD market should be the application of Section 207 protections to viewers living in rental units, condominiums and cooperative apartments. As noted above, these viewers comprise nearly forty percent of American households. Failure to extend Section 207 to them effectively closes an enormous share of the potential DBS market.

Just as access to programming was essential to the launch of DBS service, access to multiple dwelling unit ("MDU") residents is essential to the future growth of DBS. The apartment building or condominium is a bottleneck for tens of millions of potential DBS subscribers, and control of the bottleneck by landlords and cable operators operates as a real barrier to entry. Section 207 is the means to ensure access by tenants to DBS service. The FCC would be hard pressed to do anything more anticompetitive to the prospects of the DBS industry than to refuse to apply Section 207 to renters and condominium dwellers.

Discriminatory Impact on American Families of the FCC's Failure to Act

If the FCC fails to apply its rules to renters and condominium owners, it will create the ultimate "have" and "have not" situation by denying millions of American families access to important communications services based solely on homeownership, a critical indicator of economic status. Minorities and the elderly will be particularly hard hit. According to the U.S. Census Bureau, of the 35 million American families living in rented housing, about one-quarter are low-income. Two-thirds of single mothers rent their housing. Fifty-seven percent of African American families, fifty-eight percent of Hispanic families, and almost half of the Native American population, including American Indian, Eskimo, Aleut, and Pacific Islander households, rent. Almost twenty-one percent of all renters are senior citizens.

The discriminatory effect of denying Section 207 protection to renters is evident from these statistics. The result would be precisely the opposite of the intent of Congress and the often repeated policy of the Administration: to promote and facilitate universal access to new technologies bringing information and entertainment into the home. The Commission should rectify this problem by making clear that Section 207 empowers all **viewers**, not just single-family homeowners.

The Protection of Section 207 Can Be Applied to Include Renters and Condominium Owners Without Implicating the Fifth Amendment Rights of Property Owners

There is no question that the FCC can formulate rules that would safeguard the **paramount rights of viewers** to access DBS services under Section 207 while avoiding dubious Fifth Amendment concerns raised by landlords and condominium associations.

In their pleadings before the Commission, consumer groups and the DBS industry have proposed that the FCC issue rules that would only require landlords and condominium associations to provide reasonable access to DBS services at the request of a tenant or unit owner. Landlords or condominium associations would be given discretion in determining the means by which tenants or unit owners could be provided access to the DBS service as long as tenants or unit owners could receive a quality service. *Contrary to the exaggerated claims by some landlord groups, there is no need for hundreds of antennas on any apartment building's balconies, windowsills, or its roof. DBS technology can provide access to a DBS service to hundreds of individual tenants using only a single, small DBS dish on the roof of the building, thus preserving the aesthetic qualities of that building.* Moreover, the wiring required to provide multiple feeds from a single roof-top dish can be accommodated easily in virtually any building's existing cable conduit, further minimizing any intrusion or disruption to the property owner. Finally, it is anticipated that landlords will receive compensation for any costs associated with their providing access to DBS services.

Conclusion

Congress intended for the FCC to preempt regulatory and private barriers to DBS to promote diversity and choice for **all** Americans and to create competition that will lower the price to consumers of such services. Such diversity and competition will never materialize in a meaningful fashion, however, if cable's competitors such as DBS are limited *by law* to serving no more than sixty percent of the market otherwise fully accessible to traditional cable systems. Those Americans who are unable to afford their own home or choose not to own are as entitled as homeowners to greater choice in video programming services and to the benefits of a fully competitive market. The FCC can and should revise its rules to embrace the roughly forty percent of American families who rent their homes or live in condominiums so that they may fully benefit from the protections afforded by Section 207.

SUPPORTERS OF EXTENDING THE FCC'S RULES TO ALL VIEWERS, INCLUDING RENTERS AND CONDOMINIUM OWNERS:

- Congressional Black Caucus
- Consumer Federation of America
- League of United Latin American Citizens
- Minority Media Telecommunications Council
- Office of Communications of the United Church of Christ
- Writers Guild of America East
- National Rural Telecommunications Cooperative
- National Association of Broadcasters
- Consumer Electronics Manufacturers Association
- Satellite Broadcasting and Communications Association
- DIRECTV
- United States Satellite Broadcasting Company
- Philips Electronics North America Corporation
- Thomson Consumer Electronics
- Primestar
- Alphastar
- Pacific Telesis

FIFTH AMENDMENT ARGUMENTS AGAINST APPLYING SECTION 207 OF THE TELECOMMUNICATIONS ACT OF 1996 TO RENTAL UNITS AND CONDOMINIUMS ARE WITHOUT MERIT, BASED UPON FALSE FACTUAL PREMISES AND MISAPPLIED CASE LAW

I. INTRODUCTION

Landlords and condominium associations have argued at the FCC against application of Section 207 of the Telecommunications Act of 1996 to rental units and condominiums on the grounds that doing so would violate the Fifth Amendment prohibition against governmental taking of private property without just compensation. These Fifth Amendment contentions are baseless.

In their attempt to repudiate the plain meaning of Section 207 and the clear congressional intent that its protections be conferred on all viewers, landlords and developers have trotted out a parade of horribles which have no basis in reality. They envision a universe of apartment buildings with hundreds of antennas on the rooftop and tenants roaming unfettered over common areas to install antennas wherever they desire, creating safety risks and depriving landlords of the use and control of their properties. They hardly mention compensation to landlords. Opponents of full implementation of Section 207 then construct a Fifth Amendment argument upon this false factual foundation, relying principally on several precedents which are distinguishable on their face but which clearly have no application to a real world scenario.

The Fifth Amendment argument collapses when a realistic set of facts is substituted for the landlords' fanciful construct. The Commission can craft rules which trigger an obligation to provide access to DBS services only upon the request of a tenant or unit owner in a multiple dwelling unit ("MDU"). That situation is fundamentally different from so-called access statutes which confer rights of access on communications service providers or third parties. Furthermore, landlords or condominium associations could retain control over the location, means of installation and, if they so desire, ownership of the antenna, limited only by the requirement that the resident be able to receive a quality signal. One DBS dish mounted on the rooftop of a building could provide DBS service to hundreds of individual tenants residing in the building, eliminating any reasonable safety and aesthetic concerns. The wiring needed to provide multiple feeds from a single rooftop antenna can be accommodated in a building's existing cable conduit. Finally, it is anticipated that landlords will receive compensation for making DBS service available to tenants through commercial agreements with DBS service providers, third party installers or tenants themselves.

II. SECTION 207 AS APPLIED TO RENTAL UNITS AND CONDOMINIUMS DOES NOT EFFECT A TAKING WITHOUT JUST COMPENSATION

FCC rules grounded in a realistic fact pattern, such as that set forth above, would not effect any taking of property cognizable under the Fifth Amendment. In order for a statute or regulation to run afoul of the Takings clause, there must be a permanent physical occupation of private property without just compensation, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982), or, at a minimum, a severe adverse economic impact on the property owners, interfering with their investment-backed expectations. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). In this case, neither is present. Landlords or condominium associations would retain control over their property. There would be no permanent occupation of their property by third parties nor would they be required to surrender their property to the exclusive control of others. Just as there is no taking caused by statutes requiring landlords to install sprinkler systems or fire detection devices in their buildings or to provide heat or air conditioning to tenants, no taking would be effectuated by requiring landlords to make access to DBS service available to their tenants. Rather than diminishing the economic value of rental property, the likelihood is that the availability of DBS service actually would enhance its value, creating an ability to charge higher rents or achieve lower vacancy rates because of the attractiveness of DBS service offerings. Finally, landlords almost certainly would realize a revenue stream from making available DBS service, much as they currently do in the case of cable service.

A. The Cases Relied Upon By The Landlords Do Not Create A Fifth Amendment Bar To Applying Section 207 To Rental Units and Condominiums

The heavy reliance the landlords place upon the Loretto case and the Court of Appeals decision in Bell Atlantic v. Federal Communications Commission, 24 F.3d 1441 (D.C. Cir. 1994) is misplaced.

1. Loretto Is Distinguishable And Actually Supports The Position Of Section 207 Proponents

In Loretto, the Court held that a New York statute that required an apartment building owner to permit a cable television franchisee to place its wires on the owner's property constituted a per se taking of the owner's property without requiring just compensation. The Court determined that the statute mandated a permanent physical occupation of the owner's property by a third party without just compensation, thereby violating the Fifth Amendment rights of the building owner. Loretto, 458 U.S. at 419.

Loretto, however, is inapposite here because the Court's decision turned on the fact that the physical occupation of the landlord's property involved a third party, not the required provision of a service at the request of a tenant in the building where the landlord owned the installation. Loretto expressly states that a different question would have been presented to the Court if the state statute in question:

> required landlords to provide cable installation if a tenant so desires . . . since the landlord would own the installation. Ownership would give the landlord rights to placement, manner, use and possible the disposition of the installation. The fact of ownership is . . . not simply "incidental" . .; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Id. at 440, n.19.

Indeed, Loretto supports governmental authority to regulate the landlord-tenant relationship where no third-party occupation has been mandated. The Loretto Court affirmed that governmental entities "have broad power to regulate housing conditions in general and landlord-tenant relationships in particular without paying compensation for all economic injuries that such regulation entails." Id. at 440. The Loretto Court expressly states that its holding in that case does not alter the state's power to require landlords to "comply with building codes and provide utility connections, mailboxes, smoke detectors, [and] fire extinguishers . . . in the common area of a building." Loretto at 440. There is no reason to believe that the Court would treat a requirement that a landlord or condominium association install a DBS dish for common use by tenants or condominium unit owners in the building any differently.

The Supreme Court's careful discussion of the landlord-tenant relationship distinction in its Loretto decision leads directly to the conclusion that the most apt precedent for analyzing Section 207 and implementing regulations is Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987). In Florida Power, the Court held that the Pole Attachments Act, which authorized the Commission to regulate the rates that utility-pole owners charged cable companies for space on the poles, did not effect an unconstitutional taking of the pole owners' property. Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987). The Court held that the case should not be governed by the analysis in Loretto noting that while "the statute . . . in Loretto specifically required landlords to permit permanent occupation of the property by cable companies," in this case, the public utility landlords had

"voluntarily" entered into leases with cable company tenants. Id. at 252. The Court found that "the line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license." Id. at 252-253. The Court reaffirmed its characterization of the holding in Loretto as "very narrow" and reiterated that "statutes regulating economic relations of landlords and tenants are not per se takings." Id. at 252.

The instant case presents a situation like Florida Power. Here Congress determined to alter the relationship between a landlord and tenant by prohibiting a landlord or condominium association from denying access to DBS services. It is well established that Congress has the power to alter such a contractual relationship without effecting an unconstitutional taking:

> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-24 (1986).

2. The Bell Atlantic Decision Is A Statutory Authority Case And Does Not Rest Upon Fifth Amendment Grounds

Landlords and developers also argue that the extension of the FCC's rules implementing Section 207 would be analogous to the circumstances in Bell Atlantic v. Federal Communications Commission, 24 F.3d 1441 (D.C. Cir. 1994). They suggest that the Bell Atlantic Court held that the Commission's requirement that local exchange carriers ("LECs") permit competitive access providers to connect their lines to those of the LECs ("physical collocation") was a taking under Loretto. However, the Court in Bell Atlantic in fact held that the Commission could not impose a physical collocation requirement upon LECs because Congress had not expressly authorized such action.[1/]

1/ As the Commission itself acknowledges, this holding is now moot since the passage of Section 251 (c)(6) of the Telecommunications Act of 1996, which expressly requires LECs to provide physical collocation. See First Report and Order ("Interconnection Order"), CC Docket No. 96-98, CC Docket No. 95-185 at ¶¶ 613-617 (August 8, 1996), 61 Fed. Reg. 45,476 (1996).

The instant case is distinguishable from Bell Atlantic for two important reasons. First, the Court in Bell Atlantic observed that physical collocation implicated the Fifth Amendment because it required LECs to provide "exclusive use" of a portion of their facilities to third parties. Bell Atlantic, 24 F.3d at 1441. Unlike Loretto and Bell Atlantic, this case does not involve a third party occupation of an owner's property. The Commission's rules, if extended to rental and commonly owned properties, would permit landowners to maintain full authority over their property and, if they desired, to own the DBS antenna used to provide service to a requesting tenant or unit owner. Thus, commercial providers of DBS service would be provided access to multiple dwelling units, at the landlord's election, if at all, for the sole purpose of installing or maintaining the DBS equipment to accommodate the request for service from a tenant or unit owner and for the common benefit of all residents. A government-mandated, third-party occupation would not be involved at all under such circumstances.

Secondly, the Court did not decide Bell Atlantic on Fifth Amendment grounds, but rather on the basis that the Commission did not have the statutory authority to impose physical collocation. Id. at 1147. In this case, Section 207 of the Telecommunications Act of 1996 expressly mandates the Commission to issue regulations that prohibit all restrictions that "impair a viewers's ability to receive video programming services" through DBS antennas. The Commission, therefore, not only has the statutory authority to extend the FCC's rules implementing Section 207 to include rental properties and community associations, but is mandated to do so.

3. There Is No Unconstitutional Deprivation Of The Economic Benefit Of Property

Indeed, the absurdity of the landlords' position on the Fifth Amendment is underscored by their reliance on Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In that case, the Court struck down a state statute which effectively prohibited property owners from building on beachfront property. The Court's analysis focused on whether the statute denied the property owner "all economically beneficial uses" of his land, in essence leaving the property "economically idle." Lucas, 112 S. Ct. at 2895, 2901. In marked contrast to the Lucas case, a Commission rule requiring that landlords and community associations provide tenants and condominium unit owners access to DBS services upon their request would not prohibit the landowner from economically benefiting from or using his land. To the contrary, such a requirement could in fact enhance the property's value by making it more attractive to tenants and unit owners and by providing an additional stream of revenue to the property owner. The Commission can craft rules that specifically

permit a landlord or community association to recover the costs of access to DBS services.

III. CONCLUSION

The plain meaning of Section 207, the clear intent of Congress and myriad compelling policy reasons all lead ineluctably to the conclusion that the Commission should apply Section 207 to rental units, condominiums and cooperative apartments. Only an insurmountable constitutional impediment should give the Commission pause about the need to broaden its current rules. No such problem is present here. The above legal analysis demonstrates that the Fifth Amendment arguments against giving full force and effect to Section 207 are lacking in merit. Without question, the FCC can tailor its rules to apply to rental units and condominiums in a manner which does not run afoul of the Fifth Amendment.